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IT WORKS MARKETING, INC.,
IT WORKS! GLOBAL, INC.,
MARK PENTECOST, AND PAUL NASSIF

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AILEEN BROOKS, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

IT WORKS MARKETING, INC.,
IT WORKS! GLOBAL, INC., MARK
PENTECOST, and PAUL NASSIF,

Defendants.

Case No: 1:21-cv-01341-DAD-BAK (SKO)

**DEFENDANTS' NOTICE OF MOTION
AND MOTION FOR SANCTIONS**

Date: June 21, 2022
Time: 9:30 a.m.
Judge: The Hon. Dale A. Drozd

Complaint Filed: September 3, 2021

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 21, 2022 at 9:30 a.m. or as soon thereafter as the matter may be heard before the Honorable Dale A. Drozd, in the United States District Court for the Eastern District of California at the Robert E. Coyle United States Courthouse, 2500 Tulare Street, Fresno, CA 93721, Defendants It Works Marketing, Inc., It Works! Global, Inc., Mark Pentecost, and Paul Nassif (collectively, “Defendants”) will, and hereby do, move the Court for sanctions pursuant to Federal Rule of Civil Procedure 11.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the files and records in this action, and on such other written and oral argument as may be presented to the Court.

Dated: May 19, 2022

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ David Kwasniewski
David Kwasniewski

*Attorneys for Defendants
It Works Marketing, Inc.,
It Works! Global, Inc.,
Mark Pentecost, and Paul Nassif*

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1 Defendants It Works Marketing, Inc., It Works! Global, Inc., Mark Pentecost, and Paul
2 Nassif (collectively, “Defendants”) respectfully submit this Memorandum in support of their
3 Motion for Sanctions against Plaintiff Aileen Brooks and her lawyer Gregory S. Weston.

4 **INTRODUCTION**

5 In this false advertising case, Plaintiff recently testified that she never saw the ads over
6 which she is suing. Her testimony reveals that this lawsuit and all the proceedings that have
7 followed violate Rule 11 because this case’s core factual premise—that Plaintiff was supposedly
8 misled by the advertising and terms on the It Works! website—is undisputedly false. This case
9 never should have been filed because minimal investigation, *i.e.*, talking to the client about the
10 most fundamental fact in the case, would have revealed that the claims have no possibility of
11 success.

12 Plaintiff makes three claims, all of which turn on her visiting the It Works! website. Her
13 Complaint claimed that she bought an It Works! product because she read and relied on statements
14 on the website. (Dkt. 1 ¶¶ 18, 19, 99, 100.) It alleged that she was victimized by the Terms of Use
15 on the website and by the website’s renewal policy. (*Id.* ¶¶ 68-84.) Yet in a declaration she later
16 submitted to the Court, Plaintiff admitted that she never visited the website. (Dkt. 18 ¶¶ 2-5.)

17 Instead of dismissing the case after it came to light that Plaintiff never visited the website,
18 Plaintiff’s lawyer compounded his Rule 11 violations by submitting an amended complaint that
19 contained the same false factual allegations and same baseless legal theories. He further urged the
20 Court to rely on his false allegations, moved for a “preliminary injunction,” and submitted a false
21 declaration himself.

22 The foregoing conduct violates all three prongs of Rule 11. The pleading contains false
23 allegations of fact. The claims have, at all times, been objectively frivolous, and this action was
24 brought, maintained, and vexatiously multiplied for a wrongful purpose. Plaintiff’s lawyer moved
25 for a “preliminary injunction” on behalf of his uninjured plaintiff in an effort to increase the burden
26 and expense of this case, and has insisted upon maintaining claims against individuals that he does
27 not even claim were involved in making or marketing the product Plaintiff bought. Plaintiff’s
28 lawyer has a lengthy history, documented by many federal judges, of filing cases on behalf of

1 uninjured clients who were obviously not misled, filing cases on behalf of plaintiffs who did not
 2 consume the products at issue, and making frivolous and sanctionable filings. There have also
 3 been reports, noted by federal jurists, that he has paid kickbacks to individuals to act as plaintiffs to
 4 threaten and bring supposed “class action” claims. The only reason to clog up the most
 5 overworked court system in the Ninth Circuit with a putative “class action” on behalf of an
 6 uninjured plaintiff whom her lawyer did not even interview is to extort money.

7 Plaintiff’s violations of Rule 11 have forced It Works! to incur significant costs defending
 8 this action. Under Rule 11, Plaintiff, her lawyer, or both should bear those costs. To date, It
 9 Works! has incurred \$283,857.77 in reasonable attorney’s fees and costs in responding to
 10 Plaintiff’s objectively unreasonable lawsuit. Plaintiff and her lawyer should be required to pay for
 11 all the needless expenses they have caused through violating Rule 11 and needlessly multiplying
 12 this case.

13 **FACTUAL BACKGROUND**

14 **A. The Complaint**

15 Plaintiff filed this action on September 3, 2021, alleging that she sustained an injury from
 16 buying ThermoFight X^x (“ThermoFight”) from the It Works! website. (Dkt. 1.) Plaintiff alleged
 17 that she purchased the product “from the It Works website on May 11, 2020” (*id.* ¶ 18) and that she
 18 “read and relied on” representations made “on Defendants’ website and the efficacy messages they
 19 conveyed, which were substantial factors in her purchase” (*id.* ¶ 99).

20 The Complaint further alleged that Plaintiff suffered a separate injury because she was
 21 taken advantage of by the renewal policy on the It Works! website. (*Id.* ¶¶ 82–84.) The Complaint
 22 devoted 30 paragraphs to its allegations about Plaintiff supposedly being misled by the website’s
 23 renewal policy. It specifically alleged that Plaintiff agreed to the renewal policy when she made
 24 her purchase through “what appear[ed] to be a normal online retail checkout” and that Plaintiff, in
 25 making her purchases, enrolled in the “auto-shipment program” without realizing it. (*Id.* ¶¶ 55,
 26 57.) It further alleged: “In Ms. Brooks [sic] case, she was required to call Defendants’ customer
 27 service department in order to cancel her auto-renewal.” (*Id.* ¶ 84.)
 28

1 The Complaint also named Dr. Paul Nassif as a defendant. The Complaint alleged that Dr.
 2 Nassif, a board-certified reconstructive surgeon, “developed several products” without alleging
 3 whether Dr. Nassif developed ThermoFight, the only product that Plaintiff bought or otherwise
 4 took any action related to the subject matter of this litigation. (*Id.* ¶ 17.) Plaintiff also alleged that
 5 “Nassif’s former wife was one of the ‘Real Housewives of Beverly Hills[,]’” a fact that is also
 6 irrelevant to this litigation. (*Id.* ¶ 16.)

7 **B. The First Amended Complaint**

8 On November 8, 2021, Plaintiff filed the First Amended Complaint (“FAC”). In the FAC,
 9 Plaintiff alleged that she purchased ThermoFight “from an independent distributor using the It
 10 Works website.” (Dkt. 17 ¶ 77.) The FAC alleged that Plaintiff had “read and relied on”
 11 representations made “by It Works on Defendants’ website and the efficacy messages they
 12 conveyed, which were substantial factors in her purchase.” (*Id.* ¶¶ 78, 256.) Plaintiff further
 13 alleged in the FAC that she read and “relied on the reviews posted on the It Works’ Thermofight
 14 product page,” which is contained on the It Works! website (*id.* ¶ 257). According to the FAC,
 15 ThermoFight is the only It Works! product that Plaintiff purchased. (*Id.* ¶¶ 77-81.)

16 The FAC also added allegations regarding Dr. Nassif, asserting that he “partnered with It
 17 Works! to create a line of skincare products bearing his name, including It Works!/Dr. Nassif
 18 Enhancing Lash & Brow Serum, It Works!/Dr. Nassif Firming Neck Treatment, and It Works!/Dr.
 19 Nassif Illuminating Facial Pads. (*Id.* ¶ 65.) These new allegations did not assert that Plaintiff ever
 20 purchased the Enhancing Lash & Brow Serum, Firming Neck Treatment, or Illuminating Facial
 21 Pads, much less that she was somehow misled by the products. Plaintiff still did not allege that Dr.
 22 Nassif participated in developing or marketing ThermoFight.

23 **C. Plaintiff’s Declaration**

24 On November 23, 2021, Plaintiff submitted a declaration in opposition to Defendants’
 25 Motion to Compel Arbitration. (Dkt. 18-1.) It stated that she “did not view Defendants’ website at
 26 all.” (*Id.* ¶ 4.) Plaintiff’s Declaration contradicted key factual allegations in the Complaint and
 27 FAC. For example:
 28

Paragraph 18 of the Complaint alleged that “Plaintiff Aileen Brooks purchased Thermofight from the It Works Website on May 11, 2020.” Paragraph 4 of Plaintiff’s Declaration, however, states: “In making my initial Thermofight purchase, I did not view Defendants’ website at all.” (Dkt. 18-1 ¶ 4.)

Plaintiff’s Declaration also contradicts the factual allegations in the FAC. Paragraph 256 of the FAC alleges that “Plaintiff read and relied on, for her Thermofight purchase, the product’s packaging and the misrepresentations made by It Works on Defendants’ website and the efficacy messages they conveyed, which were substantial factors in her purchase.” This allegation contradicts Plaintiff’s sworn statement that she did not view the It Works! website. Plaintiff’s allegation in Paragraph 257 of the FAC, where she claims that she relied on the product reviews posted on the It Works! website, is similarly inconsistent. (FAC ¶ 257 [“Plaintiff further relied on the reviews posted on It Works’ Thermofight product page, many of which were fake or altered.”].)

Further, since Plaintiff had not seen the It Works! website (the only place where It Works! advertises), she could not have read and relied on any of the statements cited in, and attached to, her pleadings, *e.g.*, FAC pages 15-16 (describing statements about ThermoFight on the It Works! website), Exhibit 1 (printout from the It Works! website), Exhibit 4 (Loyal Customer Agreement from the It Works! website), Exhibit 5 (Product Information from the It Works! website).

Likewise, without visiting the website, Plaintiff could not have been misled by the website’s renewal policy. The FAC, however, contains 315 paragraphs, spans 113 pages, contains sections entitled “It Works Website” (pages 20-22, 27-28), “Misleading Webpage Claims” (pages 34-35, 37-38), “Misleading Product Information Page Claims” (pages 29-31, 32-34, 35-36), and contains 33 paragraphs making various allegations about the website’s renewal policy (FAC ¶¶ 185-218), which include assertions that the agreement is “[h]idden within what appears to be a normal online retail checkout.” (*Id.* ¶187.)

D. Plaintiff’s Lawyer’s Declaration

On December 15, 2021, Plaintiff’s lawyer submitted a declaration in support of Plaintiff’s Proposed Sur-Reply in Opposition to Motion to Compel Arbitration. (Dkt. 20-1 at 14-15 (“Weston Decl.”).) In this declaration, Plaintiff’s lawyer attempted to explain why the Complaint he signed

1 contained false statements about Plaintiff reading and relying on the It Works! website. Waiving
 2 privilege, he claimed that prior to filing the Complaint, “we” only asked Plaintiff “if she purchased
 3 Thermofight at a retail store or online, and she let us know that she purchased it online.” (*Id.* ¶ 2.)
 4 Plaintiff’s lawyer did not state that he (or whoever talked to her) asked any other questions of his
 5 client prior to filing the Complaint.¹ Nor did Plaintiff or her lawyer state that Plaintiff had ever
 6 reviewed the Complaint prior to its filing.

7 In the declaration, Plaintiff’s lawyer stated that once he learned that Plaintiff had
 8 supposedly purchased ThermoFight “indirectly through a website she never herself saw, we put this
 9 information into an amended complaint.” (*Id.* ¶ 7.) But as seen above, that statement is inconsistent
 10 with the FAC, which alleges, *inter alia*, “Plaintiff further relied on the reviews posted on It Works’
 11 Thermofight product page, many of which were fake or altered.” (FAC ¶ 257.)

12 Additionally, the FAC contains hundreds of paragraphs devoted to the It Works! website,
 13 and still contains claims about the Terms of Use and renewal policy being concealed from Plaintiff
 14 because they are purportedly difficult to see or access. (*See* Section C, above.) Plaintiff’s lawyer
 15 added many of these allegations when he amended the Complaint (*e.g.*, ¶¶ 185-239). And he
 16 amended the pleading to include these allegations *after* he claims to have learned that Plaintiff had
 17 never seen the It Works! website. (Weston Decl. ¶ 7.)

18 **E. Plaintiff’s Motion for a Preliminary Injunction**

19 After admittedly knowing that Plaintiff had never visited the It Works! website, Plaintiff
 20 filed a motion for a preliminary injunction, claiming that Plaintiff was likely to suffer immediate
 21 and irreparable future harm. (Dkt. 22-1 at 14.) The motion repeatedly claims the It Works!
 22 website’s renewal policy and Terms of Use as sources of ongoing harm.

23 **ARGUMENT**

24 When a “complaint is the primary focus of Rule 11 proceedings, a district court must
 25 conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless
 26 from an objective perspective, and (2) if the attorney has conducted a reasonable and competent

27 ¹ Additionally, ThermoFight is not sold in any retail store. (Declaration of Timothy Seat (“Seat
 28 Decl.” ¶ 2.) Plaintiff’s lawyer does not explain why he believed Plaintiff might have purchased
 Thermofight at a store.

inquiry before signing and filing it.” *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (citing *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002)).

I. THIS CASE IS FRIVOLOUS

Rule 11 provides, in pertinent part:

By presenting to the Court a pleading . . . an attorney . . . certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery

Fed. R. Civ. P. 11(b).

This lawsuit violates Rule 11 because (i) the pleadings have at all times contained admittedly false statements, (ii) absent the false allegations in the pleading, Plaintiff does not have a legally cognizable claim, and (iii) this case was filed for an improper purpose. *Ringgold v. Brown*, No. 2:12-CV-00717-JAM-JFM, 2013 WL 268940, at *4 (E.D. Cal. Jan. 23, 2013) (granting sanctions for the filing of a frivolous complaint and ordering an award for attorney’s fees related to the action and the Rule 11 motion). A filing that is “both baseless and made without a reasonable and competent inquiry” is frivolous. *Gen. Teamsters Loc. #439*, 2022 WL 88480 at *6 (citing *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990)). “The subjective intent of the pleader or movant to file a meritorious document is irrelevant;” rather the standard under Rule 11 is one of objective “reasonableness.” *Moore v. Chase, Inc.*, No. 1:14-CV-01178-SKO, 2016 WL 928671, at *4 (E.D. Cal. Mar. 10, 2016).

A. This Case Is Predicated on the False Statement that Plaintiff Bought ThermoFight in Reliance on the It Works! Website

Both the Complaint and the FAC are constructed upon the false factual allegation that Plaintiff visited the It Works! website. Plaintiff’s use of the It Works! website is a necessary

1 factual predicate for Plaintiff to sue It Works! for supposed injuries resulting from advertising on
 2 the website and the website's Terms of Use and renewal policy. Plaintiff's lawyer made these false
 3 allegations without reasonable inquiry and did not withdraw them once his client submitted a
 4 declaration testifying to this fact.

5 **1. The Complaint Is Premised on the False Allegation that Plaintiff Visited**
 6 **the It Works! Website**

7 The predicate of this entire lawsuit is that Plaintiff visited the It Works! website. Her main
 8 claim is that she was misled into purchasing ThermoFight based on the advertising she saw. Her
 9 Complaint specifically alleges that she made her purchase "from the It Works website" and that she
 10 "read and relied on" the marketing statements made on It Works! website. (Compl. ¶¶ 18, 19, 99,
 11 100.) Plaintiff's other claims are premised on the theory that features of the It Works! website—
 12 the website's Terms of Use and renewal policy—constitute fraudulent and unlawful business
 13 practices that supposedly injured Plaintiff.

14 Plaintiff submitted a declaration admitting that she never visited the It Works! website.
 15 (E.g., Dkt. 18-1 at ¶ 4 ("In making my initial Thermofight purchase, I did not view Defendants'
 16 website at all").) Her declaration negates her case. It was objectively unreasonable to include such
 17 false allegations in a complaint and further unreasonable to reiterate these allegations in an
 18 amended pleading that Plaintiff filed *after* she admitted that she had not visited the website.

19 **2. A Reasonable Lawyer Would Have Investigated Whether His Client**
 20 **Visited the Website Prior to Filing a Lawsuit Based Entirely on Her**
 21 **Review of and Use of the Website**

22 Rule 11 requires a lawyer to perform a reasonable investigation before making a factual
 23 representation to the Court. *Galvan v. Walt Disney Parks and Resorts, U.S., Inc.*, 2019 WL
 24 8017806, at *2 (C.D. Cal. Dec. 20, 2019) (finding that plaintiffs' counsel failed to conduct a
 25 competent inquiry where he failed to "confer with his clients about their purported cognitive
 26 disabilities and/or challenges in performing major life functions prior to filing a complaint making
 27 specific allegations regarding those topics"). A reasonable lawyer would have, at minimum, asked
 28 his client whether or not she visited the It Works! website before alleging that she did in a pleading.

1 The duty to investigate is even more important when the fact at issue is the foundational one
 2 for the entire lawsuit. The sine qua non of a false advertising case is what the plaintiff supposedly
 3 saw, where she saw it, when she saw it, what the advertising meant to her, and how she was
 4 supposedly misled. *Brownfield v. Bayer Corp.*, No. 2:09-cv-00444-JAM-GGH, 2009 WL 1953035
 5 *4 (E.D. Cal. July 6, 2009) (where plaintiffs “have not alleged any facts showing they viewed
 6 either of the Ads at issue prior to [their purchase] or that they purchased [the product] in reliance on
 7 the challenged aspect of the Ads and were injured as a result” dismissal was required because
 8 plaintiffs lacked standing and failed to state a claim). Failing to ask these basic questions before
 9 publicizing claims against a small business and dragging it into litigation is objectively
 10 unreasonable.

11 Plaintiff’s lawyer’s failure to investigate was all the more profound given that all her claims
 12 were predicated on her visiting the It Works! website. For example, Plaintiff alleged that she was
 13 injured because terms were supposedly “[h]idden within what appears to be a normal online retail
 14 checkout[.]” (Compl. ¶ 55.) A reasonable lawyer would at least ask his client whether she had seen
 15 anything about renewals when she visited the website. Plaintiff’s interactions with the website
 16 form the basis of all her other alleged remaining injuries. Under these circumstances, failure to ask
 17 about these interactions is objectively unreasonable.

18 It was separately objectively unreasonable for Plaintiff—who knew that she had not visited
 19 the website—not to read the Complaint before it was filed. *See Lubin v. Sybedon Corp.*, 688 F.
 20 Supp. 1425, 1462 (S.D. Cal. 1988) (finding class representative was inadequate when he had an
 21 ““alarming unfamiliarity with the suit”” and had “never read or seen either the original complaint or
 22 the amended complaint”). Had she done so, she would have caught the false allegations in the
 23 pleading and corrected them.

24 3. Plaintiff’s Lawyer Did Not Correct the False Allegations after Learning 25 that Plaintiff Did Not Visit the Website

26 Plaintiff’s lawyer has stated under oath that after he supposedly learned for the first time
 27 that his client had never visited the It Works! website, he attempted to “correct” this issue by filing
 28

1 the FAC. (Dkt. 20-1 at 14–15.) But since visiting the website is the linchpin of all Plaintiff’s
 2 claims, there is no way to “fix” any of the claims, as detailed in Section B, below.

3 Leaving aside the impossibility of amending the complaint to state a claim, the FAC
 4 continues to falsely allege that Plaintiff “read and relied” on representations on the It Works!
 5 website. (FAC ¶¶ 78, 256, 257.) More fundamentally, Plaintiff could not have read and relied on
 6 virtually any of the statements cited in, and attached to, the FAC, *e.g.*, FAC pages 15-16
 7 (describing statements about ThermoFight on the It Works! website), Exhibit 1 (printout from the It
 8 Works! website), Exhibit 4 (Loyal Customer Agreement from the It Works! website), Exhibit 5
 9 (Product Information from the It Works! website). And without visiting the website, Plaintiff
 10 cannot have been misled by the website’s renewal policy or Terms of Use.

11 Doubling down on a false allegation is separately sanctionable. *See Martinez v. West*
 12 *Sacramento*, No. 2:16-cv-02566-TLN-JDP, 2021 WL 2227830 (E.D. Cal. June 2, 2021). In that
 13 case, plaintiff’s lawyer filed an amended complaint accusing various state officials of providing
 14 false testimony and fabricated evidence in a prior criminal proceeding. Plaintiff’s lawyer filed the
 15 amended complaint despite having received from the defendants “undisputed evidence” that those
 16 allegations were untrue. The court held that under these circumstances, Rule 11 sanctions were
 17 warranted. The court held that what mattered was not whether plaintiff’s lawyer had performed
 18 any investigation prior to filing the amended complaint, but instead whether he engaged in “that
 19 amount of examination into the facts and legal research which is reasonable under all the
 20 circumstances of a case.” *Id.* (cleaned up). Because the amended complaint “at best, ignored the
 21 substantial amount of evidence” showing that the allegations “were not well-founded[,]” the court
 22 concluded plaintiff’s lawyer “failed to perform his duty under Rule 11 to validate the truth and
 23 legal reasonableness of the papers filed and to conduct a reasonable and competent inquiry into all
 24 available information before signing and filing the [amended complaint].” *Id.*

25 This case presents similar facts: Plaintiff’s lawyer filed the Complaint without asking if his
 26 client ever visited the website; and then filed the FAC containing virtually identical allegations
 27 even after his client told him (and signed a sworn declaration to this effect) that she never visited
 28

1 the website. No “competent attorney” would have signed and filed the FAC given the “undisputed
2 evidence” that Plaintiff never visited the website. *See id.*

3 **B. The FAC Is Also Objectively Baseless Because No Reasonable Lawyer Could**
4 **Believe that His Client Could Sue over Representations She Never Relied on**

5 This case is objectively unreasonable because no reasonable lawyer could believe that a
6 client who did not read or rely on any of the representations claimed to be misleading could state a
7 claim. To proceed in federal court, a plaintiff must have standing for each claim they seek to
8 assert. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Having not visited the website,
9 Plaintiff could not have suffered any injury as a result of the advertising on the website, or the
10 renewal policy or Terms of Use, which were supposedly hidden from Plaintiff when she visited the
11 website. *Id.* (“Article III does not give federal courts the power to order relief to any uninjured
12 plaintiff, class action or not.”) This renders all of Plaintiff’s claims objectively frivolous.

13 Separately, Plaintiff purports to assert claims under the California Unfair Competition Law
14 (“UCL”) (Cal. Bus. & Prof. Code §§ 17200, *et seq.*), the California False Advertising Law (“FAL”)
15 (Cal Bus. & Prof. Code §§ 17500, *et seq.*), and the California Consumer Legal Remedies Act
16 (“CLRA”) (Cal. Civ. & Prof. Code §§ 1750, *et seq.*). (FAC ¶¶ 281-314.) The UCL, FAL, and
17 CLRA “have independent requirements for standing, which mandate allegations of actual reliance.”
18 *Stewart v. Electrolux Home Prod., Inc.*, 2018 WL 1784273, *4 (E.D. Cal. Apr. 13, 2018). An
19 individual that did not actually read or rely on representations cannot bring claims arising from
20 those representations under the UCL, FAL, or CLRA. *See In re Ferrero Litig.*, 794 F. Supp. 2d
21 1107, 1111 (S.D. Cal. 2011) (finding failure to state a claim under UCL, FAL, and CLRA where
22 plaintiffs alleged reliance on Nutella’s labels and advertising, but admit they never personally
23 visited the Nutella website). These requirements are well known to Plaintiff’s lawyer. *Peviani v.*
24 *Natural Balance Inc.*, 2011 WL 1648952 at *3 (S.D. Cal. May 2, 2011) (dismissing case filed by
25 Plaintiff’s lawyer because plaintiff had not consumed product at issue).

26 It is objectively unreasonable to believe that Plaintiff has any viable claims given her
27 admission that she has never visited the It Works! website. The foundation of Plaintiff’s claims is
28 that she read and relied on representations on the It Works! website and that those representations

1 were substantial factors in her purchase. (FAC ¶¶ 77, 78, 256, 257.) Plaintiff alleges that she
 2 purchased the It Works! product at issue “based on the product’s deceptive labeling and website.”
 3 (FAC ¶ 258.) Plaintiff could not have seen the label prior to buying the product because the
 4 product is only sold on the It Works! website. (Seat Decl. ¶ 2.) Plaintiff’s theory of injury thus
 5 hinges entirely on her visiting the It Works! website and being supposedly misled by
 6 representations therein.

7 It is likewise objectively unreasonable to believe that Plaintiff has any viable claims arising
 8 from It Works! Terms of Use or Auto-Renewal policies. Since Plaintiff never visited the website,
 9 she could not have been misled by these agreements or suffered any injury from these agreements

10 Plaintiff’s claims against Dr. Nassif similarly lack any legal basis. The It Works! products
 11 that Dr. Nassif developed are unrelated to ThermoFight and Plaintiff never bought any products in
 12 the Dr. Nassif Collection. Plaintiff thus does not have standing to pursue any claims against Dr.
 13 Nassif. Plaintiff has failed to allege any actions undertaken specifically by Dr. Nassif that would
 14 give rise to liability under the UCL, FAL, or CLRA. In fact, Plaintiff has failed to articulate any
 15 connection whatsoever between Dr. Nassif and her purchase of ThermoFight.

16 Where, as here, a complaint is filed by an attorney who knew or should have known the
 17 claims could not succeed, Rule 11 sanctions are warranted. *Gen. Teamsters*, 2022 WL 88480 at *7
 18 (issuing Rule 11 sanctions against plaintiff and attorney who filed a frivolous complaint when a
 19 review of publicly available records would have shown that the claims lacked merit). Plaintiff has
 20 no basis—neither legally nor factually—of asserting claims under the UCL, FAL, or CLRA given
 21 that she never read or relied on representations on the It Works! website.

22 **C. Plaintiff Compounded Her Rule 11 Violations by Filing for a “Preliminary** 23 **Injunction”**

24 Once Plaintiff’s lawyer learned that Plaintiff never visited the It Works! website, he was
 25 under a Rule 11 obligation to withdraw the Complaint. Rather than withdraw the Complaint,
 26 Plaintiff’s lawyer doubled down with an amended complaint that was replete with knowingly false
 27 allegations, which for the reasons above is a separate Rule 11 violation. Plaintiff and her lawyer
 28 compounded this violation by then asking the Court to rely on her false FAC by seeking a

preliminary injunction. (Dkt. 22.) This is separately sanctionable. *O'Brien v. Alexander*, 898 F. Supp. 162, 176 (S.D.N.Y. 1995) (asking the Court to rely on knowingly false allegations violates Rule 11).

II. THIS ACTION WAS FILED FOR AN IMPROPER PURPOSE

Courts find improper purpose where a plaintiff has been informed of the falsity of his or her claims, but insists upon maintaining them anyway. *See Townsend*, 914 F.2d at 1144. Moreover, Plaintiff's lawyer has been reprimanded for a wide variety of misconduct before the courts of the Ninth Circuit. For example, Plaintiff's lawyer has been sanctioned by the Ninth Circuit for filing a frivolous appeal in *Walker v. B&G Foods, Inc.*, No. 16-15349, ECF No. 16 (9th Cir. July 20, 2016) (slip op.). He has a lengthy, documented history of repeatedly filing the same putative "class action" claims on behalf of the same recycled plaintiffs, including at least the following matters:

- Plaintiff Adam Perez: *Perez v. Costco Wholesale Corp.*, No. 13-cv-1687 (S.D. Cal.); *Perez v. The J.M. Smucker Co.*, No. 12-cv-00853 (S.D. Cal.).
- Plaintiff Mary Henderson: *Henderson v. Gruma*, 10-cv-04173-AHM-AJW (C.D. Cal.); *Henderson v. the J.M. Smucker Co.*, No. 10-cv-04525 (C.D. Cal.).
- Plaintiff Troy Backus: *Backus v. Gen. Mills, Inc.*, No. 15-cv-01963 (N.D. Cal.); *Backus v. Nestle USA, Inc.*, No. 15-cv-01963-MMC (N.D. Cal.); *Backus v. Conagra Foods*, C 16-00454 WHA (N.D. Cal.); *Backus v. BiscoAmerica Corp.*, No. 16-cv-3916-HSG (N.D. Cal.)
- Plaintiff Victor Guttman: *Chacanaca v. The Quaker Oats Co.*, No. C 10-502 RS (N.D. Cal.); *Peivani v. Hostess Brands, Inc.*, No. 10-cv-2303 (C.D. Cal.); *Guttman v. Ole Mexican Foods, Inc.*, No. C 14-04845 (N.D. Cal.); *Guttman v. La Tapatia Tortilleria, Inc.*, No. C 15-2042 SI (N.D. Cal.); *Guttman v. Nissin Foods (U.S.A.) Co.*, C 15-00567 WHA (N.D. Cal.)
- Plaintiffs Mark and Maxine Beasley: *Beasley v. Conagra Brands, Inc.*, 18-cv-06730-SI (N.D. Cal.); *Beasley v. Tootsie Roll Indus., Inc.*, 4:18-cv-07724-YGR (N.D. Cal.); *Beasley v. Lucky Stores, Inc.*, 3:18-cv-07144 (N.D. Cal.); *Beasley v. Subco Foods, Inc.*, 19-CIV-03681 (Cal. Super. Ct., San Mateo Cty.)
- Plaintiff Shavonda Hawkins: *Hawkins v. AdvancePierre Foods, Inc.* (S.D. Cal. 3:15-cv-02309); *Hawkins v. Kroger Co.*, 3:15-cv-02320-JM-BLM (S.D. Cal.); *Hawkins v. Kellogg Co.*, No. 3:16-cv-00147 (S.D. Cal.)
- Plaintiffs Tiffini and Steve Altes: *Altes v. Conagra Brands*, 2:19-cv-03952 (C.D. Cal.); *Greenbrier Int'l, Inc.*, 2:19cv03011 (C.D. Cal.); *Altes v. Star Brands N. Am., Inc.*, 2:19-cv-04399 (C.D. Cal.).

1 Plaintiff's lawyer's various misuse of the legal process has earned him repeated
 2 admonishments from other district courts. The Honorable George Wu in the Central District of
 3 California held:

4 The Weston Firm's former co-counsel testified under oath that Mr.
 5 Weston had (1) offered a "kickback" to an employee's roommate in
 6 return for serving as a named plaintiff in a class action; (2) promised
 7 a "finder's fee" to his employee in return for "signing up" her
 8 roommate as a named plaintiff; and (3) agreed to compensate the
 9 firm's non-lawyer employees with settlement proceeds on a
 10 percentage basis.

11 *Red v. Kraft Foods, Inc.*, 2011 WL 4599833 *14 (C.D. Cal. Sept. 29, 2011). The court further
 12 noted "The Weston Firm's having been reprimanded by three different federal judges in 2010" and
 13 that the Honorable James Ware refused to approve a settlement on the grounds that "The Weston
 14 Firm had not 'done all that they can do in the interest of the class.'" *Id.*; see also *Red v. Kraft*
 15 *Foods, Inc.*, No. 10-cv-1028-GW (AGRx) (C.D. Ca. Apr. 29, 2015), ECF No. 356 (reducing fee
 16 petition submitted by the Weston Firm from over \$1.9 million to \$11,368); *Peviani v. Natural*
 17 *Balance Inc.*, 2011 WL 1648952, *3 (S.D. Cal. May 2, 2011) (dismissing case filed by Plaintiff's
 18 lawyer because class representative had not consumed product at issue); *Weston Firm, P.C. v.*
 19 *Reese Richman LLP*, 2010 WL 11684859, *2 (S.D. Cal. Sept. 30, 2010) ("this Court is now
 20 concerned that Weston deliberately failed to mention Judge Ware's September 14th ruling in an
 21 attempt to invoke this Court's power through deception" and issuing an order to show cause as to
 22 why Mr. Weston should not be sanctioned); *Red v. Unilever PLC*, 2010 WL 3629689, *3 (N.D.
 23 Cal. Sept. 14, 2010) ("Mr. Weston's statements at the hearing raise serious concerns for the Court
 24 with respect to his ability to hold the attorney fees from the settlement in trust").

25 Plaintiff's naming Dr. Nassif as a defendant further highlights her improper purpose in
 26 filing this action. Plaintiff fails to allege any connection between Dr. Nassif and her purchase of
 27 ThermoFight. Plaintiff alleges that Dr. Nassif was involved in the development of three It Works!
 28 products, none of which Plaintiff ever purchased. The only possible reason that Plaintiff and her
 lawyer could have for personally suing Dr. Nassif is that he is a public figure. Plaintiff needlessly
 added allegations about Dr. Nassif's ex-wife, and her appearance in a reality television program in
 the FAC (FAC ¶ 35) for the sole purpose of harassing Dr. Nassif in hopes of coercing a nuisance

1 payment from him. These allegations have nothing to do with any claim or defense in this case.
 2 This is separately sanctionable under Rule 11(b)(1).

3 Further, Plaintiff has insisted upon litigating this case in the most vexatious manner possible
 4 in hopes of coercing a nuisance payment from Defendants. Despite admittedly never visiting the It
 5 Works! website and thus having no good-faith basis for filing this action, Plaintiff refused to
 6 dismiss her claims. Instead, Plaintiff filed a Motion for Preliminary Injunction while Defendants'
 7 Motion to Compel Arbitration was pending as a means of vexatiously multiplying the proceedings
 8 and thus driving up Defendants' costs to defend this action.

9 **III. PLAINTIFF AND HER LAWYER SHOULD BE REQUIRED TO PAY** 10 **DEFENDANTS' LEGAL FEES AND COSTS**

11 Because this case is, and always has been, frivolous, Plaintiff and her lawyer are at least
 12 liable for all the needless attorney's fees and costs imposed on Defendants in defending against this
 13 frivolous action. *Mitchel v. City of Santa Rosa*, 601 F. App'x 466, 469 (9th Cir. 2015) (proper
 14 measure of Rule 11 sanctions are those attorney fees and expenses "reasonably necessary to resist
 15 the offending action" (quoting *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1985)). This sanction
 16 is particularly appropriate given Mr. Weston's demonstrated history of vexatiously filing frivolous
 17 suits. *See supra* Section II; *see also Portnoy v. Veolia Transp. Servs., Inc.*, No. 2:13-CV-00043-
 18 MCE-EF, 2014 WL 3689366, at *6 (E.D. Cal. July 24, 2014) (granting a motion for sanctions and
 19 ordering payment of attorney's fees and noting need for such sanction given plaintiff's history of
 20 filing frivolous suits); *Regents of Univ. of California on behalf of UC Davis Health Sys. v. Stidham*
 21 *Trucking Inc.*, No. 16-CV-02835-MCE-CKD, 2018 WL 338998, at *3 (E.D. Cal. Jan. 8, 2018)
 22 (granting motion for sanctions and ordering payment of attorney's fees resulting from plaintiff's
 23 lawyer's Rule 11 violation).

24 Here, Defendants have been forced to incur at least \$283,857.77 to date. (Declaration of
 25 David Kwasniewski in Support of Motion for Sanctions ¶¶ 4-7.) Plaintiff, her counsel, or both,
 26 should be required to pay all those fees and costs.
 27
 28

CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion be granted in the form of the attached Proposed Order and the Court grant Defendants their attorney's fees related to this action and the Rule 11 motion in the amount of \$283,857.77.

Dated: May 19, 2022

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: /s/ David Kwasniewski
David Kwasniewski

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